

# TERMS AND CONDITIONS

## Formation of Contract

1. Quotations made by the Supplier shall not be construed as an offer or obligation to supply in accordance with the quotation. The Supplier reserves the right to accept or reject, at its discretion, any offer to purchase received by it from the Applicant.
2. Quotations provided by the Supplier are valid for a period of 30 days unless otherwise specified. Prices agreed between the Supplier and the Applicant in respect of an order will be fixed from the date of acceptance of the order, provided the Supplier is permitted to manufacture the Goods on its own normal production schedule and ship immediately on completion, and subject to any rise and fall provisions specified within the quotation.
3. Placement of an order, either verbally or in writing, will constitute acceptance of the Supplier's quotation and of these Terms and Conditions.
4. Orders for Goods must be submitted in the form required by the Supplier.
5. These Terms and Conditions apply to, and are incorporated into any quote or order between the Applicant and the Supplier, to the exclusion of the Applicant's terms and conditions of purchase or any other document.

## Delivery and Force Majeure

6. The Supplier is deemed to have delivered the Goods when they are made available for unloading at the delivery location specified in an order.
7. Unless otherwise agreed in an order, the Goods will be transported at the Applicant's cost and risk.
8. Shipping dates are approximate only. The Supplier will not be liable for delay in performance of its obligations under these Terms and Conditions resulting from or contributed by circumstances beyond the Supplier's control and/or without limitation from or by acts of God and other, fire, explosion, flood, accident to plant or equipment, riots, terrorism, wars or national emergency, labour disputes of every kind, however caused, acts of government, inability to obtain suitable material or equipment, acts of carriers or postal authorities.
9. The Applicant may not cancel an order for Goods because of any such delay or for any other reason not the fault of the Supplier.
10. Partial shipments may be made and invoiced on completion of manufacture.
11. If delivery is delayed at the request of the Applicant, the Supplier may invoice Goods in accordance with any previously agreed delivery schedule or otherwise when it is prepared to make the shipment.
12. Where delivery is delayed at the request of the Applicant, the Supplier may at its discretion, charge storage fees at a rate of \$50 per week or 0.15% of invoice value, whichever is the greater. The Goods will be stored at the Applicant's risk.

## Risk in Goods

13. Where Goods are sent carriage forward, all responsibility on the Supplier's part ceases when the goods leave the Suppliers works. Where Goods are sent carriage paid, the Supplier will repair or replace free of charge goods damaged in transit, provided that the carriers and the Supplier receive written notification of such damage within three days of delivery, but not otherwise, and provided that in case of loss or damage in transit the Supplier's responsibility under this clause is limited to that which the Supplier is able to enforce upon the railway company and/or other carriers.

## Claims and Returns

14. Goods which are damaged before delivery, incorrectly sent or short delivered must be notified in writing to the Supplier within 48 hours of delivery.
15. The Applicant will not return any Goods to the Supplier without obtaining prior authorisation from the Supplier. No returns will be accepted unless a copy of the purchase invoice is enclosed. Only damaged or incorrect Goods notified as required and authorised by the Supplier may be returned to the Supplier within 14 days of delivery.
16. The Supplier will not accept returns of Goods which have been manufactured at the Applicant's request, or procured as a special order from overseas.
17. In the event of an incorrect selection of Goods, Goods must be returned "unused" and in fully resalable condition (original packaging) within 14 days of purchase, at the Applicant's cost. Returns will be subject to a restocking fee of 20% of the invoiced price for those Goods.
18. The Applicant bears the freight costs for Goods returned to the Supplier. The Supplier has absolute discretion as to whether to accept the return of Goods for any other reason.

## Retention of Title

19. Property in the Goods supplied by the Supplier to the Applicant does not pass to the Applicant until the money owing for those Goods, and any other money owing by the Applicant to the Supplier, has been paid in full.
20. Until the Goods have been paid for in full:
  - (a) *the Applicant must hold the goods in a fiduciary capacity for the Supplier and agrees to store the Goods in such a manner that they can be identified as the property of the Supplier, and shall not mix the Goods with other similar goods;*
  - (b) *the Applicant must not either sell the Goods or use the Goods in a manufacturing or construction process, other than in the ordinary course of its business, in which case the Applicant grants to the Supplier a security interest in either every payment to the Applicant for the Goods or the portion of every payment for the manufactured product that relates to the Goods (both as proceeds of the Goods and as original collateral); and*
  - (c) *the Applicant must not sell, assign, charge or otherwise encumber or grant any interest over any debts and other obligations which any third party may owe to the Applicant as a result of the use, manufacture or resale of the Goods.*
21. The Applicant irrevocably authorises the Supplier at any time, to enter any premises upon which the Goods are stored to enable the Supplier to inspect the Goods and, if the Applicant has breached these Terms and Conditions or suffers an Insolvency Event (as defined in clause 70(c)(iii)), to reclaim possession of the Goods. The Applicant indemnifies the Supplier against any liability to any person in connection with such entry or reclamation.
22. The Applicant acknowledges and agrees that:
  - (a) *this clause creates a security interest in all present and after acquired Goods and any proceeds as security for the Applicant's obligations to the Supplier;*
  - (b) *the Supplier is a secured party in relation to the Goods and any proceeds of the Goods, and is entitled to register its interest on the register as a security interest, and if applicable, a purchase money security interest;*

- (c) *the Supplier may, by notice to the Applicant, require the Applicant to take all steps requested by the Supplier to ensure its security interest in the Goods and the proceeds is enforceable, and to perfect, or better secure the position of the Supplier and the Applicant must comply with that notice;*
  - (d) *the Supplier is not obliged to give any notice, document or information under the PPSA, unless the provision of the notice, document or information is required by the PPSA and cannot be excluded; and*
  - (e) *it will provide 14 days prior written notice of any changes to the Applicant's name, address, or other contact details required on the register.*
23. A term used in italics in clauses 19- 23 has the same meaning as in the PPSA.
  24. The Applicant will be responsible for the Supplier's costs and expenses in exercising its rights under clauses 19 - 23.
  25. The Applicant agrees that where the Goods have been retaken into the possession of the Supplier, the Supplier has the absolute right to sell or deal with the Goods, and if necessary, sell the Goods with the trademark or name of the Applicant on those Goods, and the Applicant hereby grants an irrevocable licence to the Supplier to do all things necessary to sell the Goods bearing the name or trademark of the Applicant.

## Suspension or Cessation of Supply

26. The Supplier may in its complete discretion and without incurring any liability to the Applicant, cease or suspend the supply of Goods to the Applicant.
27. Without limiting clause 26, if an Event of Default occurs, the Supplier may, without prejudice to its other rights and to the extent permitted by law, call up moneys owed to it by the Applicant, retain all moneys paid on account, or cease further deliveries and recover from the Applicant all loss of profits and other costs arising from the Event of Default and/or take immediate possession of any Goods for which payment remains outstanding.
28. In the event delivery of Goods is delayed due to the withdrawal of credit, the Supplier will not be liable for any damage resulting directly or indirectly from such action.

## Indemnity

29. The Applicant indemnifies the Supplier and will keep the Supplier indemnified against:
  - (a) *all losses incurred by the Supplier;*
  - (b) *all liabilities incurred by the Supplier; and*
  - (c) *all costs actually payable by the Supplier to its own legal representatives (whether or not under a costs agreement) and other expenses incurred by the Supplier in connection with a demand, action, arbitration or other proceeding (including mediation, compromise, out of court settlement or appeal);*  
  
*arising directly or indirectly as a result of or in connection with:*
    - (d) *the supply of Goods by the Supplier to the Applicant; and*
    - (e) *the carrying out of any work by the Supplier on the Applicants' or any other person's property;*

*unless caused by the wilful misconduct of the Supplier or any of its employees or agents acting within the scope of their employment.*

## Payment terms

30. Goods and/or services are supplied on a "cash on delivery" basis unless an Application for Commercial Credit has been approved by the Supplier. Notwithstanding, orders for goods to be brought in or otherwise manufactured specifically for the Applicant, may require a deposit at the time of order.
31. Credit terms for approved Applicant's is strictly thirty (30) days (or such other period agreed in writing by the Supplier) from the date of invoice and payment is due and payable on that date.
32. Time is of the essence in respect of the Applicant's obligation to make payments for Goods sold by the Supplier to the Applicant.
33. If the Applicant defaults in making payment to the Supplier in accordance with these Terms and Conditions, the Supplier may in its absolute discretion:
  - (a) *charge the Applicant interest calculated on the portion of the Applicant's account overdue at the rate of 2% per month from the date on which the default arose; and*
  - (b) *require the Applicant to reimburse the Supplier for all collection costs including legal costs incurred by the Supplier calculated on a solicitor and client basis as a consequence of the Supplier instructing its solicitor to provide advice to it in connection with the default and/or to institute such recovery process as the Supplier decides in its discretion.*

## Credit and provision of information

34. The Applicant acknowledges and agrees that the credit to be provided to the Applicant by the Supplier is to be applied wholly or predominantly for business purposes or investment purposes (other than investment in residential property).
35. The Applicant undertakes to comply with any request by the Supplier to provide further information for the purpose of assessing the Applicant's creditworthiness, including an updated credit application.
36. If the Applicant is a corporation, with the exception of a public listed company, it must advise the Supplier of any alteration to its corporate structure. (e.g. by changing directors, shareholders, or its constitution). In the case of a change of directors or shareholders, the Supplier may ask for new guarantors to sign a guarantee and indemnity.

## Withdrawal or Variation of Credit

37. The Supplier may at any time, without reason, vary or withdraw any credit granted to the Applicant.

## Capacity/ relationship

38. These Terms and Conditions bind the Applicant both personally and as a trustee of any trusts of which the Applicant is a trustee.
39. If the Applicant is a partnership, the Applicant warrants that either:
  - (a) *all of the partners have signed these Terms and Conditions and that all of the partners will enter into a guarantee and indemnity with the Supplier in relation to the Applicant's obligations to the Supplier; or*

- (b) *the person who has signed these Terms and Conditions on behalf of the partnership is authorised by each partner of the partnership to agree these Terms and Conditions on behalf of the partnership.*
40. If the Applicant consists of more than one person, the obligations of each person are joint and several.
41. The Applicant must keep confidential all prices, rebates and allowances offered by the Supplier.

#### Waiver

42. A waiver of any provision or breach of these Terms and Conditions by the Supplier must be made by an authorised officer of the Supplier in writing. A waiver of any provision or breach of these Terms and Conditions by the Applicant must be made by the Applicant's authorised officer in writing.

#### Costs

43. The Applicant must pay for its own legal, accounting and business costs and all costs incurred by the Supplier relating to any default by the Applicant. The Applicant must also pay for all stamp duty and other taxes payable in connection with these Terms and Conditions (if any).
44. The Applicant will pay the Supplier's costs and disbursements incurred in pursuing any recovery action, or any other claim or remedy, against the Applicant, including debt recovery fees and legal costs on an indemnity basis. Such costs and disbursements will be due and payable by the Applicant to the Supplier irrespective of whether pursuit of the recovery action, claim or remedy is successful.
45. The Applicant acknowledges and agrees that payments by the Applicant under clause 44 will be applied by the Supplier as follows:
- firstly, in payment of any and all collection costs and legal costs.*
  - secondly, in payment of any interest incurred.*
  - thirdly, in payment of the outstanding invoice(s).*

#### Taxes and duty

46. The Applicant must pay GST on any Taxable Supply made by the Supplier to the Applicant under these Terms and Conditions. The payment of GST is in addition to any other consideration payable by the Applicant for a Taxable Supply. The GST exclusive consideration otherwise to be paid or provided for that Taxable Supply is increased by the amount of any GST payable in respect of that Taxable Supply and that amount must be paid at the same time and in the same manner as the GST exclusive consideration is otherwise to be paid or provided.
47. A party's right to payment under this clause is subject to a valid tax invoice being delivered to the recipient of the Taxable Supply.
48. To the extent that a party is required to reimburse or indemnify another party for a loss, cost or expense incurred by that other party, that loss, cost or expense does not include any amount in respect of GST for which that other party is entitled to claim an input tax credit.

#### Set-off

49. All payments required to be made by the Applicant under these Terms and Conditions will be made free of any set-off or counterclaim and without deduction or withholding.
50. Any amount due to the Supplier from time to time may be deducted from any monies which may be or may become payable to the Applicant by the Supplier.

#### Warranty and Limitation of Liability of the Supplier

51. The Supplier warrants the parts, components, equipment manufactured or supplied by it, to be free from defects in material and workmanship.
52. Except as provided in this clause, to the extent permitted by law, all conditions and warranties implied by law which may be binding on the Supplier are excluded.
53. Upon return, transportation charges pre-paid to the Supplier's factory, within one year of original shipment, the Supplier will repair or replace, at its option, any equipment which it determines to contain defective material or workmanship, and will return said equipment to the Applicant, f.o.b. the Supplier's factory. The Supplier shall not be obligated, however, to repair or replace equipment which has been improperly installed, altered or otherwise misused or damaged in any way or repaired by others. The Supplier will not be responsible for any dismantling, re-assembly or re-installation charges.
54. Except as provided in clauses 51 - 55, and to the extent permitted by law, the Supplier has no liability (including liability in negligence) to any person for:
- any loss or damage consequential or otherwise suffered or incurred by that person in relation to the Goods or advice, recommendations, information or services; and*
  - in particular, without limiting clause 54(a) above, any loss or damage consequential or otherwise suffered or incurred by that person caused by or resulting directly or indirectly from any failure, defect or deficiency of any kind of or in the Goods, or advice, recommendations, information or services.*
55. The Applicant warrants that it is acquiring the Goods for the purpose of re-supply or for the purpose of using them up or transforming them for production, manufacture or repairing or treating other goods or fixtures on land.

#### Testing

56. Manufactured items are carefully inspected at the Supplier's works before despatch. If special tests are required, whether or not in the presence of the Applicant's representatives, details of such tests must be agreed upon in writing between the Supplier and Applicant at the time of requesting a quotation from the Supplier. Failure to do so may incur additional fees to be agreed between the parties.

#### User Responsibility in Goods Selection and Disclaimer in regard to Advice

57. The Goods are inherently technical in nature and warranted to perform to specified tolerances in load, volume, air temperature etc. Due to the wide variety of conditions in which applications may operate, it is not possible for the Supplier to contemplate all technical parameters that are necessary in selecting Goods. The Applicant is required to provide all relevant information in relation to the intended use of the Goods and to ensure the Goods they order from the Supplier are suitable for and are used only for their intended use in accordance with any instructions on their use.

58. The Supplier accepts no responsibility for the provision of advice, unless that advice has been provided in writing and is in direct response to a written request from the Applicant, detailing the scope of the intended use and operating environment of the component or application.
59. The Applicant through its own analysis and testing is solely responsible for:
- making the final selection of the Goods by the Applicant;*
  - that the incorporation of the Goods within an application will not provide any safety risk; and*
  - assuring compliance with all applicable legislation and industry standards.*

#### Safety measures or compliance with standards

60. To the extent permitted by law, unless agreed to specifically in writing by the Supplier, any control circuit or control system, including hardware or software, does not in any way claim to offer any safety measures or compliance with any standard. It is the sole responsibility of the Applicant to ensure safety and compliance with all applicable legislation, the prevailing best practices, and the standards applicable to any individual application.

#### Transport Applications

61. The supply of any Goods to be incorporated into any transport application is subject to that application meeting Australian Design Rules ("ADR") for vehicle or rail safety, including but not limited to the application incorporating a fail safe mode.

#### Severance

62. If any provision of these Terms and Conditions are not enforceable in accordance with its terms, other provisions which are self-sustaining are, and continue to be, enforceable in accordance with their terms.
63. If any part of these Terms and Conditions are invalid or unenforceable, that part is deleted and the remainder of the Terms and Conditions remain effective.

#### Variation

64. These Terms and Conditions may be varied, added to, or amended at any time by the Supplier in its complete discretion without incurring any liability to the Applicant at any time by written notice to the Applicant. The Supplier will provide the Applicant with 7 days notice of such changes.

#### Entire agreement

65. These Terms and Conditions constitute the entire agreement between the parties relating in any way to its subject matter. All previous negotiations, understandings, representations, warranties, memoranda or commitments about the subject matter of these Terms and Conditions are merged in this agreement and are of no further effect.

#### Jurisdiction

66. These Terms and Conditions are governed by the laws of the state of New South Wales. The Applicant submits to and consents to the jurisdiction of the courts of New South Wales and of the Commonwealth of Australia.

#### Assignment

67. The Applicant may not assign or otherwise transfer its rights and obligations under these Terms and Conditions without the Supplier's prior written consent.
68. The Supplier may assign or otherwise deal with its rights under these Terms and Conditions or any obligation owed by the Applicant or any Guarantor, in such manner as it considers appropriate. The Applicant agrees that the Supplier may disclose information or documents that it considers desirable to enable it to exercise this right. The Applicant also agrees that the Supplier may disclose information or documents in relation to the Applicant to any person to who the Supplier assigns its rights under these Terms and Conditions.

#### Privacy Act

69. The Applicant agrees to the terms of the *Privacy Act 1988* authorisation contained in this document.

#### Definitions

70. In these Terms and Conditions unless the context requires otherwise:
- Applicant means the party for whom a quotation or tender for supply has been prepared, or the applicant whose details appear in the Application for Commercial Credit and the Applicant's subsidiaries, holding companies and other related entities;*
  - Corporations Act means Corporations Act 2001 (Cth);*
  - Event of Default means any of the following events:*
    - the Applicant fails to pay for any Goods and/or the Applicant breaches these Terms and Conditions;
    - the Applicant ceases or threatens to cease carrying on business;
    - if the Applicant is a company: it becomes an "externally administered body corporate" (within the meaning of the Corporations Act); or if the Applicant is a natural person: if they become an "insolvent under administration" (within the meaning of the Corporations Act) or the Applicant dies or becomes mentally or physically incapable of managing his or her affairs, or an order is applied for or made to place the assets and affairs of the Applicant under the control of another person (Insolvency Event);
  - Goods includes all products and services supplied by the Supplier to the Applicant;*
  - GST means GST as defined in the GST Act;*
  - GST Act means \*A New Tax System (Goods and Services Tax) Act 1999 as amended, or any replacement or other relevant legislation and regulations;*
  - PPSA means the Personal Property Securities Act 2009 (Cth);*
  - Supplier means SMC Pneumatics (Australia) Pty Limited ABN 64 000 543 519 or SMC Manufacturing (Australia) Pty Ltd ABN 49 003 250 413, as indicated in the application for Commercial Credit, and the relevant entity's related bodies corporate (as that term is defined in the Corporations Act)*
  - Taxable Supply has the meaning set out in the GST Act; and*
  - Terms and Conditions means these terms and conditions, including the Application for Commercial Credit, Privacy Act Authorisation and Deed of Guarantee and Indemnity.*